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September 15, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Restoring Internet Freedom, WC Docket No. 17-108

Dear Ms. Dortch:

In this letter, Level 3 responds to certain claims made in AT&T's reply comments in this proceeding. As detailed below, the central narrative in AT&T's discussion of interconnection is based on a false assertion of fact. The remainder of the discussion contains little new, and nothing of merit.

As Level 3 has explained, the Commission's 2015 *Open Internet Order*, also known as the *Title II Order*,[1] went a long way toward addressing a very real problem. Prior to the order, some of the largest consumer ISPs were intentionally congesting their interconnections to other networks in a game of chicken to force those other networks to pay unjustifiable access tolls. Following the order's assertion of jurisdiction over consumer ISPs' interconnection practices, those big providers changed their conduct dramatically, and Level 3 was able to enter into new interconnection agreements with them, benefiting the consumer ISPs' customers, Level 3's own customers, and the Internet more broadly. Because the biggest consumer ISPs have gotten even bigger since 2015, there is every reason to believe that they would revert to their anti-consumer ways if the Commission were to relinquish its authority over their interconnection practices.

Much of AT&T's discussion of interconnection in its reply comments consists of a purported retelling of the history of the congestion AT&T caused with other networks like Level 3. According to AT&T, "in the years leading up to the *Title II Order*" congestion resulted from

[1] Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, FCC 15-24, 30 FCC Rcd 5601 (2015) (*Open Internet Order* or *Title II Order*).

Level 3 attempting to gain "artificial" commercial advantage over CDNs like Akamai and Limelight by "misusing" its peering arrangements "in violation of" Level 3's peering agreement with AT&T, "which required a reasonable balance of exchanged traffic as a condition of settlement-free interconnection."[2]

AT&T's story is false. To be clear, using AT&T's own words: "in the years leading up to the *Title II Order*" Level 3's peering agreement with AT&T did *not* "require[] a reasonable balance of exchanged traffic as a condition of settlement-free interconnection." AT&T has simply made its story up. What is more, AT&T itself has already turned over documents to the Commission that prove its story is false: AT&T and Level 3 produced their peering agreement as part of the Commission's investigation of Internet traffic exchange practices in 2014.[3] Level 3 would be happy to produce it again should the Commission need another copy.[4]

Aside from the fictitious story at its core, AT&T's discussion of interconnection in its reply comments largely retreads arguments from its initial comments, to which Level 3 has already responded. A few of AT&T's assertions, however, bear further discussion.

First, even if it were not untrue, AT&T's story—that Level 3 wants an artificial commercial advantage over competing CDNs like Akamai and Limelight—makes no sense. AT&T is well acquainted with Level 3's view on the appropriate policy framework for interconnection. Level 3 believes reasonableness requires, at a minimum, that a requesting network like Level 3 *or Akamai or Limelight* should be entitled to settlement-free peering from a big BIAS provider like AT&T if the requesting network has sufficient traffic and is willing to exchange traffic at reasonable locations of the BIAS provider's own choice. That is the opposite of seeking an artificial advantage: Level 3 believes big consumer ISPs like AT&T should not collect unjustifiable access tolls from any network operator, whether Level 3 or anyone else.

AT&T further claims that "[i]nterconnection among IP networks has functioned efficiently for more than two decades without intervention by the Commission or other regulatory authorities" and that "the *Title II Order* made no contrary findings."[5] AT&T does not explain what it means by the word "efficiently" in this context. Nevertheless, not even AT&T

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[2] *See* AT&T Reply Comments at 40-42.

[3] *See* Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion, Press Release (rel. June 13, 2014) (announcing investigation).

[4] AT&T's assertion that Level 3 "demanded that AT&T pay to upgrade the capacity of those few links" of interconnection between the two networks is also false. *See* AT&T Reply Comments at 41. While reasonableness requires that AT&T pay for its own network equipment, Level 3 in fact repeatedly offered to purchase the necessary equipment to upgrade AT&T's interconnection capacity, including publicly offering to do so. *See* Level 3 Reply Comments at 12-13; Letter from Joseph C. Cavender, Level 3, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attachment at 7 (filed Oct. 27, 2014) ("Level 3 and Cogent have both publicly offered to buy the interconnection equipment for the ISPs as a simple way to augment capacity.") (Level 3 Oct. 27, 2014 *Ex Parte*).

[5] *See* AT&T Reply Comments at 38.

has questioned the fact that interconnection disputes harmed tens of millions of American consumers, including millions of AT&T's own customers, for years leading up to the *Open Internet Order*. After discussing those disputes in the order,[6] the Commission went on to observe that when traffic exchange breaks down, "it risks preventing consumers from reaching the services and applications of their choosing, disrupting the virtuous cycle," and, on that basis, declared that "[t]he Commission will be available to hear disputes" relating to BIAS providers' Internet traffic exchange practices.[7] Moreover, setting aside AT&T's opaque but freighted—and misleading—assertions about efficiency and the findings of the *Open Internet Order*, AT&T overlooks the key role that concerns about BIAS providers' interconnection practices played in two recent proposed mergers, one of which was blocked, at least in part, due to those concerns, and one of which was approved only with substantial interconnection-related conditions.[8] None of those statements and actions support a conclusion that the Commission believed interconnection issues were being resolved "efficiently" when big ISPs like AT&T created congestion to attempt to extract access tolls prior to the Commission's assertion of jurisdiction.

AT&T also suggests that the fact that AT&T's customers access more data *from* Level 3's network than they send *to* Level 3's network means that AT&T should be permitted to extract unlimited access tolls from Level 3 (and others from whom AT&T's customers also access more data) for such allegedly out-of-balance traffic.[9] AT&T's argument makes no sense—indeed, not even AT&T really believes it. As Level 3 has explained previously, whenever a network carries data traffic, it incurs costs, but the cost is determined, not by the *direction* traffic flows, but by (a) the amount of traffic and (b) the distance the traffic is carried.[10] Level 3's "balanced bit-mile" peering policy reflects the goal of balancing those burdens, quantified in bit-miles, between peers.[11] That is the "balance" that is meaningful, not send:receive ratios.[12] Netflix's own experience bears out the same point: it offered to ensure that the send:receive ratio for its traffic would be precisely 1:1, but to no one's surprise, big ISPs like

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[6] *See Open Internet Order* ¶ 199.

[7] *Id*. ¶ 205.

[8] *See* Level 3 Reply Comments at 3 & nn. 10-11 (discussing the Comcast-Time Warner Cable and Charter-Time Warner Cable merger proceedings).

[9] *See* AT&T Reply Comments 42-43.

[10] *See* Level 3 Oct. 27, 2014 *Ex Parte*, Attachment at 8.

[11] In a peering relationship, each peer is typically paid by its own customers to provide access to the entire Internet. Accordingly, as between peers, the most reasonable thing is generally to divide the burden of the traffic exchange roughly equally. That is, put simply, what Level 3's "balanced bit-mile" peering policy does. Nevertheless, Level 3 has been willing to carry more than an equal share of the burden when it peers with big consumer ISPs like AT&T.

[12] If two networks have roughly equal geographic scope and both use "hot potato" routing to exchange traffic with each other, and if they have roughly equal send:receive ratios, then the bit-mile burden between them is likely to be roughly equal.

AT&T were not interested in exchanging traffic with Netflix (or its providers) on a settlement-free basis under those circumstances, either.[13]

For similar reasons, AT&T's suggestion that Level 3, in its brief 2005 peering dispute with Cogent, had a position like AT&T's today, is incorrect.[14] Level 3's focus in that context was on ensuring that the two networks more equally shared the bit-mile burden associated with their peering relationship. In other words, the discussion was more about hot-potato versus cold-potato (sometimes called "best-exit") routing than about a meaningless send:receive ratio, AT&T's mischaracterizations notwithstanding.

AT&T further asserts that the "equitable long-term agreement" AT&T and Level 3 signed in 2015 was "the product of the same marketplace dynamics that have governed interconnection from its inception" rather than a consequence of the Commission's assertion of jurisdiction over interconnection.[15] It is, of course, not literally impossible that AT&T's dramatic change of heart relating to the material terms of its interconnection negotiations with Level 3 was unrelated to the adoption of the *Open Internet Order*, and that the timing of its Road-to-Damascus conversion, after years of impasse, was purely coincidental. But it is more plausible that AT&T's about-face was motivated by a concern that the Commission would, at long last, declare AT&T's harmful, anti-consumer practices unlawful. AT&T, in any event, has given no basis to believe its story, and the Commission could not rationally rely on it to disclaim jurisdiction over interconnection.

A final misstatement by AT&T is worth noting. AT&T claims that Level 3 has "abandoned" its "untenable position" that providers like AT&T "should be obligated to pay for augments *ad infinitum*, no matter how extreme the increase in unidirectional traffic and associated cost of upgrades."[16] First, the statement is simply false. Level 3 believes that big consumer ISPs like AT&T *should* augment as necessary to exchange traffic to support their customers without artificial limits on growth—just like Level 3 does. And Level 3 believes that each network in a peering relationship ought to pay the costs associated with augmenting its own network (and, as is typical, alternate paying for cross-connects). The position is hardly "untenable." To the contrary, it is the least that AT&T owes its own customers. When AT&T represents that it will provide best-efforts Internet access to its customers, it is AT&T's duty to engineer its network to deliver what it sold. That includes provisioning adequate interconnection

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[13] *See* Level 3 Oct. 27, 2014 *Ex Parte*, Attachment at 8; *see also* Reed Hastings, Internet Tolls and the Case for Strong Net Neutrality, Netflix Blog, *available at* https://media.netflix.com/en/company-blog/internet-tolls-and-the-case-for-strong-net-neutrality.

[14] *See* AT&T Reply Comments at 42-44.

[15] *Id*. at 43. To be clear, the AT&T-Level 3 agreement is far from "equitable." It contains terms that are harmful both to Level 3 and the Internet more broadly, which Level 3 tried to persuade AT&T not to insist upon. Nevertheless, because AT&T had become less unreasonable, if not actually reasonable, in its demands, Level 3 was willing to sign the agreement in order to bring additional capacity online more rapidly than would likely have been the case if Level 3 had pursued a complaint with the Commission.

[16] *See id*. at 43-44.

capacity.[17] That is particularly so because providing adequate interconnection capacity costs AT&T almost nothing.[18] On the other hand, AT&T's belief that it should be entitled to use its market leverage to demand other networks pay AT&T's made-up access tolls to pad AT&T's margins may be tenable—because AT&T has succeeded in the past—but it is unjustifiable.

Please contact me if you have any questions regarding this matter.

Sincerely,

/s/ Joseph C. Cavender
Joseph C. Cavender

[17] Indeed, the New York Attorney General has filed suit against Charter because Time Warner Cable, prior to being acquired by Charter, deceived its customers by selling them Internet service and then intentionally *not* provisioning adequate interconnection capacity, which appears to be what AT&T proposes to do. *See generally* Comments of People of the State of New York.

[18] *See* Level 3 Reply Comments at 12.